IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE THIRTY FIRST DAY OF DECEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE SRI JUSTICE M.H.S. ANSARI

AND
THE HON'BLE SRI JUSTICE B.SESHASAYANA REDDY

WRIT PETITION No. 23134 of 2003

Between:

K.S.N. Prasad Engineering &

Pre-stressed Products [Private] Limited,
Purushottapuram, Chinamusidivada, Pendurthy,
Visakhapatnam-531173, rep. by its Manager K.R.K.Raju

S/o. Sivarama Raju, Hyderabad. **.... PETITIONER**

AND

1. Commissioner of Central Excise & Customs, Visakhapatnam.
2. Eastern Power Distribution Company of A.P. Limited, Visakhapatnam, rep., by its Chairman & Managing Director.
3.The Superintending Engineer Operation Circle, APEPDC Limited, Visakhapatnam.

.....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of Mandamus declaring the action of the respondents 2 and 3 in not paying the Central excise duty on the PCC poles supplied by the petitioner to it as illegal, arbitrary and unconstitutional and consequently direct the respondents to forthwith pay the said amounts.

Counsel for the Petitioner: Mr.B.ADINARAYANA RAO

Counsel for Respondent No.1: Mr.ARAJASHEKAR REDDY,

SC FOR CG.

Counsel for Respondent Nos.2 & 3: Mrs.M.Vinobha Devi,

SC FOR APEPDEC Ltd.

The Court made the following :

THE HON'BLE SRI JUSTICE M.H.S.ANSARI

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AND

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THE HON'BLE SRI JUSTICE B. SESHASAYANA REDDY

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WRIT PETITION No.23134 of 2003

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ORDER: (per Hon'ble Sri Justice M.H.S.Ansari)

The reliefs prayed for in the instant writ petition are founded on the averments stated in the affidavit filed in support of the writ petition. Briefly stated, they are; pursuant to a tender notice dated 30-8-1992 for manufacture and supply of pre-stressed cement concrete poles for 11 KVA low tension power transmission lines, the petitioner submitted a tender. The A.P. State Electricity Board (APSEB), now having the nomenclature, A.P. Transmission Corporation Ltd., the subsidiary of which, A.P. Eastern Power Distribution Company Ltd., (A.P.E.P.D.C. Ltd.) accepted the petitioner's bid and pursuant thereto, an agreement was executed between the parties i.e., the petitioner and respondent No.2 herein. According to the petitioner, as per Special Condition No.F.1, it is the liability of the Board to pay the Central/Sales Tax legally payable. Reliance is placed upon Special Condition No.F.1, which reads as under.

"F.1.The rate per pole shall be inclusive of cost of all material and labour inclusive of all taxes and duties leviable as on 04-11-1982 by Central/State Governments and local bodies on raw materials but exclusive of Central/State sales tax legally payable on the finished poles which only will be to the Board's account. Any variation in the taxes or duties, levied thereafter i.e., after 04-11-1982 will be to the Board's account. The Board will not,

however, be responsible for the payment of sales tax or any other taxes or duties made by the contractor under misappropriation of law."

It is the further case of the petitioner that the cost component of the raw material is pre-determined and the Board all-through the execution of the contract mentioned the prices of cement per M.T. as Rs.870/- and the price of steel as Rs.8265/- per M.T. regardless of the actual variation of the prices in the market. The petitioner paid the Central Excise on the poles taking the valuation in terms of the contract. However, the Excise authorities objected to the valuation of the poles stating that the assessable value of the goods shall be current market value. A notice of demand was issued by the Commissioner of Central Excise and penalty was also levied. It is averred that, upon intimation of the said liability by the petitioner to respondent No.2, it (petitioner) was advised to file appeal and the same was admitted by CEGAT directing the petitioner to make a pre-deposit of a sum of Rs.2,00,000/-, which sum was paid by respondents 2 and 3. Ultimately, the said appeal was dismissed by order dated 23-1-2003 by CEGAT.

It is the contention of Mr.B.Adinarayana Rao, learned counsel for the petitioner that the liability being statutory, the same is payable in terms of the contract by respondents 2 and 3. It was further contended that the contention of respondents that the petitioner should first pay the Excise duty and then claim reimbursement, being the only defence of the respondents, is untenable. It is, therefore, contended that a direction accordingly should be issued to respondents 2 and 3 to comply with their obligations under the contract and pay the Excise duty to the respondent authorities.

The claim is resisted on the grounds stated in the counter affidavit filed on behalf of second respondent. Therein, it is admitted that the supply of two raw materials are by the Board and that the petitioner has to receive the conversion charges. The consolidated prices were revised on the rates quoted as on 4-11-1992. These rates are subject to variation as per Clause F.3 of the contract. The petitioner receives the invoices of conversion charges in terms of the escalation clause with regard to escalation of labour charges. It is further stated that the petitioner also receives the invoices of the raw materials supplied for claiming the MODVAT credits and thus has knowledge about the prices of raw materials and it was, therefore, for the petitioner to revise the values of the raw materials. Being a manufacturer of excisable goods, it was for the petitioner to have followed the procedure and

regulations in the matter of Central excise payments. With regard to the appeal filed by the petitioner before the CEGAT, the case of respondent No.2 is that the petitioner did not prosecute the appeal and the same was dismissed due to non-prosecution. The appeal was not decided on merits. It is not denied by respondent No.2 that the petitioner submitted claim through Ex.P.3 intimating the Board to pay the amount of Rs.9,32,153/- to the Central Excise Department, but its stand is that as final orders were passed not on merits, but due to lapses and laches of the petitioner, it is its (petitioner's) responsibility to pay the said amount. In reply to the averments in paragraph 10 of the affidavit filed in support of the writ petition, it is stated that the letter from the Board dated 15-4-2003 marked as Ex.P.4 has been received by the petitioner asking it to pay the differential amounts and then seek for reimbursement explaining its stand.

Insofar as respondent No.1 being Commissioner of Central Excise & Customs is concerned, his stand appears to be that he is not concerned with the *inter se* dispute between the petitioner and its customer. The liability of excise duty is on the manufacturer and respondent No.1 is, therefore, not concerned with the dispute as raised in the writ petition.

Learned Standing Counsel for the Central Government reiterated the above contentions. None appeared on behalf of respondents 2 and 3.

The foremost question for consideration before the Court is with regard to the maintainability of the instant writ petition.

The matter is one arising under non-statutory contract (tender). Even though the respondent contracting party is a State within the meaning of Article 12 of the Constitution of India, can the relief as prayed for be granted in exercise of its writ jurisdiction by this Court?

Mr.Adinarayana Rao, learned counsel for the petitioner, relied upon the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** wherein this aspect of the matter was considered and more particularly learned counsel has drawn attention of this Court to those observations contained in paragraph 27 of the judgment which read as under.

"From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

a. In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

b. Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

c. A writ petition involving a consequential relief of monetary claim is also maintainable."

It is not and cannot be disputed that respondents 2 and 3 are statutory authorities being instrumentalities of the State. It is also not in dispute that the responsibility for payment of Central/State sales tax on finished poles is that of the said respondents in terms of special condition F.1 extracted supra except those made by the contractor under mistake of law. It is also not disputed that the petitioner is primarily responsible for payment of excise duty in respect of excisable goods, in the case on hand, being the pre-stressed cement concrete poles.

The substantive defence of respondents 2 and 3 appears to be that, firstly, the petitioner was furnished with the invoices of raw materials supplied to it for claiming MODVAT credits and thus has knowledge about the prices of raw materials. It was, therefore, for the petitioner to have followed the procedure according to law with regard to payment of excise duty. The particulars as disclosed by the petitioner to the Central Excise authorities without revising the same periodically commensurate with the hike in the prices of the raw materials resulted in the levy of penalty. Secondly, the stand appears to be that the petitioner must first pay the excise duty and thereafter claim reimbursement from respondents 2 and 3.

As held in **ABL International Ltd.** (supra), in appropriate cases, a writ petition arising out of a contractual obligation is maintainable against a State or a instrumentality of State. As a matter of rule, a Writ Court may not refuse to entertain a writ petition even where some disputed questions of fact arise for consideration. In other words, in appropriate cases, a Writ Court may entertain a writ petition.

The question now for consideration is whether the instant case is an appropriate case where the discretion to entertain writ petition should be exercised in favour of the petitioner.

The case on hand, more particularly with regard to the relief as prayed for, is akin to the judgment of the Supreme Court in **State of U.P. v. Bridge & Roof Co. (India) Ltd.**. The distinguishing feature, in the case on hand, is absence of any arbitration clause in the contract between the parties and further, the relief is for payment of excise duty, whereas in **Bridge & Roof Co.** case (supra), the relief claimed was against deduction of sales tax at the statutory rate.

The Supreme Court in **Bridge & Roof Co.** case opined that the very remedy of writ in the facts of that case is misconceived on the ground that the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. "Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated and could not have been agitated in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract, and if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition." Unlike the facts in **ABL International Ltd.** (supra), which were not in dispute, the facts of the cases on hand require adjudication before any relief can be granted. The disputed questions that require consideration, *prima facie*, appear to be with regard to the particulars as disclosed by the petitioner to the Central Excise authorities, and whether the petitioner revised the same periodically commensurate with the hike in the prices of raw materials, whether the petitioner was furnished with the invoices of raw materials supplied to it, and on that basis claimed MODVAT credits, and thus, had knowledge about the prices of raw materials, in determining the excise duty payable, whether the procedure prescribed was followed by the petitioner in furnishing correct particulars with regard to prices of raw materials and other inputs which have to be considered in the light of the special conditions of the contract in paragraphs F.1, F.2 and F.3. In the absence of relevant material and evidence on record before us, it would not be either proper nor prudent to adjudicate on these issues much less on the question as to the liability of the respondents to pay the penalty levied on the petitioner. The latter is dependent upon the answer to the questions of fact raised in the counter affidavit to which we have alluded to. In the facts and circumstances of this case, we

are not inclined to entertain the writ petition on the ground of availability of efficacious alternative remedy to the petitioner by way of civil suit.

The writ petition is accordingly dismissed with liberty, however, to the petitioner to avail of such remedies as may be available to it at law and as it may be advised. It need only be clarified that if the petitioner avails of such remedy, the statements or observations made in this judgment and order shall not prejudicially affect either parties to those proceedings which shall be heard and disposed of upon their own merits uninfluenced in any manner by any statement or observation contained in this judgment and order.

In the result, with liberty as afore-stated reserved to the petitioner, the writ petition is dismissed, however, without any order as to costs.

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(M.H.S.ANSARI, J.)

31st December 2004.

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(B.SESHASAYANA REDDY, J.)

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To

1. Commissioner of Central Excise & Customs, Visakhapatnam.
2. Eastern Power Distribution Company of A.P. Limited, Visakhapatnam, rep., by its Chairman & Managing Director.
3. The Superintending Engineer Operation Circle, APEPDC Limited, Visakhapatnam.
4. 2CD copies.